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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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OF THE STATE OF UTAH
BIRGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JERRY V. STRAND,
Plaintiff-Appellee,

vs.

PRINCE-COVEY & CO.,
INC., and ALMON COVEY,
Defendant-Appellant.

Case No.
13804

BRIEF OF ~~APPELLEE~~ *Respondent*
JERRY V. STRAND

Appeal From Judgment of the District Court of the Third
Judicial District in and for Salt Lake County, State of Utah
Honorable Gordon R. Hall, Judge

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FILED

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	ii
STATEMENT OF FACT	1
ARGUMENTS:	
POINT I	
THERE IS NO ISSUE OF MATERIAL FACT	2
POINT II	
PLAINTIFF IS ENTITLED TO JUDG- MENT AS MATTER OF LAW	6
A. THE DEFENDANT WAS NOT A BONA FIDE PURCHASER OF THE STOCK IN QUESTION	6
B. ASSUMING DEFENDANT PUR- CHASED PLAINTIFF'S STOCK DE- FENDANT COULD NOT HAVE BEEN A BONA FIDE PURCHASER AS:	6
1. DEFENDANT'S AGENT'S KNOWL- LEDGE OF PLAINTIFF'S OWN- ERSHIP WOULD BE IMPUTED BY LAW TO DEFENDANT	6

	<i>Page</i>
2. DEFENDANT'S RETENTION OF THE PROCEEDS OF THE CON- VERTED PROPERTY RATIFIED THEIR AGENT'S CONVERSION ..	6
C. ASSUMING THE KNOWLEDGE OF DEFENDANT'S AGENT WILL NOT BE IMPUTED TO THE DEFEND- ANT PLAINTIFF IS STILL EN- TITLED TO SUMMARY JUDG- MENT AS KNOWLEDGE IS NOT AN ESSENTIAL ELEMENT OF A CONVERSION ACTION	7
D. VALUE IS NOT AN ISSUE	16
POINT III	
THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND FOR REHEARING	17
POINT IV	
THE UTAH SUPREME COURT SHOULD NOT ORDER A SET-OFF	30
CONCLUSION	30

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Caribou Four Corner's Inc. v. Truck Insurance Exchange 443 F.2d 796 (10th Cir. 1971)	21
DiSilvestro v. U.S. Veterans Administration, 9 FRD 435 (E.D.N.Y. 1949)	20

	<i>Page</i>
Flett v. W. A. Alexander and Co., 302 F.2d 321 (7th Cir. 1962) cert. den. 371 U.S. 841 (1962) ..	20
Hartford Accident and Indemnity Co. v. Shaw, 273 F.2d 133 (8th Cir. 1959)	20
Kahle v. Amtorg Trading Corporation, 13 FRD 170 (D.C.N.J., 1952)	24
Klapprott v. United States, 355 U.S. 601 (1949) ..	29
Ledwith v. Storkan, 2 FDR 530 (1942)	26
Samson v. Radio Corporation of America, 434 F.2d 315 (2nd Cir. 1970)	26
Valmont Industries, Inc. v. Enresco, Inc., 445 F.2d 1193 (10th Cir. 1971)	21
United States v. Aerodex, Inc. 327 F. Supp. 1027 (S.D. Fla 1970)	21
Allred v. Hinkley, 8 Utah 2d 73, 328 P.726 (1958)	14
Barsh v. Mullins, 338 P.2d 845 (Okla. 1959)	11
Board of Education v. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963)	28
Chrysler v. Chrysler, 5 Utah 2d 415, 303 P.2d 995 (1956)	22
Cutler v. Haycock, 32 Utah 354, 99 Pac. 897 (1907)	22
Drury v. Lunleeford, 8 Utah 2d 74, 515 P.2d 662 (1966)	29
Kettner v. Snow, 13 Utah 2d 382, 375 P.2d 28 (1962)	22

	<i>Page</i>
Latsis v. Nick Floor, 99 Utah 214, 104 P.2d 619 (1940)	13
Malia State Bank Commissioner v. Giles, 100 Utah 562, 114 P.2d 208 (1941)	13
Masters v. LeSeuer, 13 Utah 2d 293, 373 P.2d 573 (1962)	26
McWhirter v. Donaldson, 36 Utah 293, 104 Pac. 731 (1909)	22
Moses v. Archie McFarland & Son, 119 Utah 602 P.2d 531 (1951)	13
Peterson v. Crosier, 29 Utah 235, 81 Pac. 860 (1905)	22
Reynolds v. Snow, 197 NYS 2d 590 aff'd 168 NE 2d 882 (N.Y. App. Div. 1960)	12
Salt Lake Hardware Co. v. Neilson Land and Water Co. 43 Utah 406, 134 Pac. 911 (1913)	22
Thirteenth and Washington Street Corp. v. Nelsen, 123 Utah 70, 254 P.2d 847 (1953)	13
Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 711 (1953)	21
Western Securities Company v. Silver King Con- solidated Mining Company of Utah, 57 Utah 88 192 Pac. 664, 672 (1920)	16

Statutes

Federal Rules of Civil Procedure, Rule 60(b)	18
Revised Statutes of Utah, 1898, Section 3005	22
Utah Rules of Civil Procedure, Rule 60(b)	4
Utah Rules of Civil Procedure, Rule 69(b)	18

	<i>Page</i>
<i>Books</i>	
Restatement 2d, Agency Section 271	9
Restatement 2d, Agency, Section 274	9
Restatement 2d, Agency, Section 282	10
Restatement 2d, Judgments, Section 126 (e) and (f) and example 7, p. 617	27
3 Am. Jur 2d, Agency, Section 270	12
3 Am. Jur 2d, Agency, Section 261	12
18 Am. Jur. 2d, Section 7 Conversion, 261	16
7 Moore's Federal Practice, p. 254	24
7 Moore's Federal Practice, p. 257	26
7 Moore's Federal Practice, p. 362	28

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY V. STRAND,

Plaintiff-Appellee,

vs.

PRINCE-COVEY & CO.,
INC., and ALMON COVEY,

Defendant-Appellant.

Case No.
13804

BRIEF OF APPELLEE JERRY V. STRAND

STATEMENT OF FACT

The plaintiff agrees with the defendant's statement of fact except in one important particular.

The defendant claims that the plaintiff JERRY STRAND filed no affidavit to support his purported ownership of the stock or to support any other allegation in his complaint (see defendant's brief page 3). The plaintiff's deposition was taken prior to hearing

on the motion for Summary Judgment and at the hearing the defendants, themselves, moved to publish that deposition. The deposition, under oath, supports all the allegations to plaintiff's complaint.

ARGUMENT

POINT I

THERE IS NO ISSUE OF MATERIAL FACT

The defendants urge this court to reverse the lower court by attempting to point out two "unresolved issues of fact". In so doing, the defendants failed to consider a substantial portion of the record that was before the lower court and also this court. That part of the record was plaintiff's deposition. Somehow, in preparing their brief, the defendants overlooked that it moved for and was granted the publication of plaintiff's deposition (R-22). That deposition, under oath, answers all of the "unresolved issues" that defendants have raised.

The defendant in its brief states that the plaintiff at no time averred under oath to support its proposition that he owned the stock in question (defendant's brief, page 3). However, on page 6 and again on pages 9 and 10 of plaintiff's deposition, he testified as to his own ownership. In addition, the plaintiff's allegation of ownership was further supported by the defendant's own agent's affidavit.

Q. Now, you allege that in your complaint that at least as of January 13, 1972 that you were the owner of 6,000 shares of Hoffman Resources, Inc., common stock; is that correct?¹

A. If that's the date in the complaint, yes. I don't recall right now.

Q. That's the date in the complaint.

A. All right.

Q. When did you purchase these shares?

A. I was constantly trading in the Hoffman stock both as stock and as a riding option on stock, so as to these specific shares it was—they may well be acquired pursuant to an option or they may have been purchased, but I specifically don't remember right now what specific dates they were acquired.

Q. Where were you purchasing the stock? Through what broker?

A. Some of it were through individuals. Some of it was through various brokers, both in this city and other cities.

Q. Do you keep any records of these transaction?

A. Yes, I do.

Q. Do you have those records in your possession?

A. I have them in my possession, yes. Either I or Elmer Fox has those records.

Q. Elmer Fox being your accountant?

¹ The evidence before the trial court was that 4,000 shares of stock and not 6,000 shares of stock were picked up on the occasion which is the subject of this law suit.

A. Yes.

Q. Do you recall the certificate numbers on these 6,000 shares?

A. I don't recall them but I do have a copy of the receipt I think that was given to Ted England for the stock. (Plaintiff's deposition pages 6 and 7)

These averments were not denied under oath by defendants at the Summary Judgment hearing. In its answer the defendants only denied plaintiff's ownership because of lack of information.

After Summary Judgment was granted, defendant's attorney filed an affidavit inferring circumstantially that plaintiff was not the owner of the stock in question. The affidavit was not before the court at the time of the hearing on the motion for Summary Judgment and, therefore, was not properly considered by the lower court. The affidavit was filed in support of a motion to set aside the Judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The court denied the motion because the information had always been in the defendant's attorney's knowledge and could not be considered newly discovered evidence, mistake, inadvertance, surprise, nor would it support any of the grounds enumerated in Rule 60(b).

In the affidavit, defendant's attorney averred some weeks before the alleged conversion that plaintiff testified in a Supplemental Proceeding that he did not own any Hoffman stock. Even if the affidavit had been before the court on Summary Judgment, it would not

have raised a genuine issue of material fact. The affidavit seeks to circumstantially infer that because some weeks prior to the conversion plaintiff had testified he did not own the stock. He, therefore, could not have owned the stock at the time of conversion. The circumstantial inference was refuted by direct evidence by both the plaintiff in his deposition and defendant's agent in his affidavit. Even defendant's attorney averred that plaintiff had testified that he had options on a considerable amount of Hoffman stock. Thus, the affidavit would not raise a genuine issue of material fact. Had defendants filed their affidavit before the hearing, plaintiff could have easily answered, under oath, how he exercised his options and acquired ownership to the stock between the time of the Supplemental Hearing and the conversion.

The other supposed "unresolved issue of fact" is the date upon which plaintiff discovered the conversion. This would be material for the purposes of assessing damages. However, on page 18 and again on page 21 of plaintiff's deposition, plaintiff testified concerning the date that he discovered the conversion.

Q. Now, you've alleged in your complaint that September 13, 1972 was the date at which the conversion took place. Do you—were you aware on September 13 that's when the conversion took place?

A. Was I aware at the time, is that your question?

Q. Right. On September 13, yeh.

A. I was aware after—well, approximately that time perhaps, within a day or two.

Q. In other words, around September 13, 14, or 15, you became aware that your stock had been sold?

A. That's correct.

(Plaintiff's deposition page 18)

The unresolved issues of facts raised by defendant in their brief were not unresolved and had the defendants read the entire record — including plaintiff's deposition— they would have discovered the answers.

POINT II

PLAINTIFF IS ENTITLED TO JUDGMENT AS MATTER OF LAW

- A. *The defendant was not a bona fide purchaser of the stock in question.*
- B. *Assuming defendant purchased plaintiff's stock defendant could not have been a bona fide purchaser as:*
 - 1. *Defendant's agent's knowledge of plaintiff's ownership would be imputed by law to defendant.*
 - 2. *Defendant's retention of the proceeds of the converted property ratified their agent's conversion.*

C. *Assuming the knowledge of defendant's agent will not be imputed to the defendant, plaintiff is still entitled to Summary Judgment as knowledge is not an essential element of a conversion action.*

A. *The defendant was not a bona fide purchaser of the stock in question.*

The defendants attempt to avoid liability by straining to argue that they did not convert plaintiff's securities but they purchased them; and that they were bona fide purchasers. While plaintiff agrees with the defendant's statement of law concerning bona fide purchasers, the facts simply do not support the plaintiff's claim.

The defendant's own statement of the facts are as follows:

Mr. England agreed that if defendant would pay Mr. England's debt to Murray First Thrift, thereby obtaining release of the stock, Mr. England would sell the stock, repay the defendant for the Murray First Thrift payment and use the balance of the proceeds to pay or reduce his debt (R-20) (defendant's brief pages 2 and 3). Mr. Covey accompanied Mr. England to Murray First Thrift where Mr. Covey delivered defendant's check to pay the loan and Murray First Thrift released and delivered to Mr. England certificates representing at least 4,000 shares of Hoffman Resources stock . . . Mr. Covey and Mr. England returned to Prince Covey & Co. offices where 4,000 shares of the stock were deposited in England's personal ac-

count and sold. Proceeds were given to defendant Prince-Covey & Co. to repay it for the money advanced to Murray First Thrift and to pay or reduce England's debt to defendant (R-20) (defendant's brief page 3).

Under no strain of interpretation did those facts amount to a purchase of the shares by Prince-Covey & Co. The shares were merely sold by Prince-Covey & Co.

B. Assuming defendants purchased plaintiff's stock it could not have been a bona fide purchaser as:

- 1. Defendant's agent's knowledge of plaintiff's ownership would be imputed by law to defendant*
- 2. Defendant's retention of the proceeds of the converted property ratified their agent's conversion.*

The defendant again attempts a strained interpretation of the facts to support its argument that the knowledge of its agent would not be imputed to it. Again, the plaintiff does not quarrel with the well established rule that the knowledge of the agent will not be imputed to the principal in transactions where in the parties were acting adversely. However, the facts simply do not support such a proposition. The defendant and its agent were acting jointly for their mutual benefit. The defendant issued its check to obtain securities that were pledged at a lending institution. The defendant and the agent received the stock together

and transported the same to the offices of defendant. There the stock was deposited in an account at defendant's offices. From there, through the use of defendant's facilities as a brokerage firm, the stock was sold. The proceeds came from the buying broker to defendant and it retained a portion of the proceeds to satisfy its position and paid the balance to its agent (see defendant's own statement of facts on pages 2 and 3 of its brief).

This is not a case where the defendant purchased stock from its agent but rather where the two of them together sold stock through the defendant's facilities and divided the proceeds. It can hardly be said that the agent and the principal's interest were adverse — they were the same.

The fact that England may have had a personal interest did not prevent the defendant from being on notice as to plaintiff's interest in the stock converted. *The Restatement of Agency 2d*, Section 271 states:

A notification by or to a third person to or by an agent is not prevented from being notice to or by the principal because of the fact that the agent, when receiving or giving the notification, is acting adversely to the principal, unless the third person has notice of the agent's adverse purposes.

Consequently, to the extent that England was acting on his own behalf as well as for the incidental benefit of the defendants, the defendants are liable for his conversion. Section 274 of the *Restatement of Agency 2d*, states

The knowledge of an agent who acquires property for his principal affects the interest of his principal in the subject matter to the same extent as if the principal had acquired it with the same knowledge, except where the agent is privileged not to disclose or to act upon the knowledge, or a change in conditions makes it inequitable thus to affect the principal.

Further, subsection c. of the Comment of Section 274 states:

Where an agent, having no power to bind the principal by the transaction, acquires property from a third person by fraud and, without the principal's knowledge transfers it to the principal to make up for past or future embezzlements, the principal takes it subject to a constructive trust, . . .

Section 282 of the *Restatement of Agency* 2d provides:

(1) A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purposes except as stated in Subsection (2).

(2) The principal is affected by the knowledge of an agent who acts adversely to the principal:

(a) if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby; . . .

(c) *if, before he has changed his position the principal knowingly retains a benefit through the act of the agent which otherwise he would not have received.* (Emphasis added.)

Comment c. to Section 282 of the *Restatement of Agency 2d* states:

c. *Meaning of 'acting adversely.'* The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests. The rule as stated herein is substantially similar to the rule stated in Sections 235-236, dealing with the liability of a principal or master for the torts of his agent, and the Comment on those Section is applicable.

Section 235 of the *Restatement of Agency 2d*, Comment b. on mixed motives states:

b. *Mixed motives.* The servant may be within the scope of employment, although his departure from instructions in the performance of his work is for his own purposes, if his act is done with the intent to serve his employer. In such case, the rule stated in Section 236 applies.

Section 236 of the *Restatement of Agency 2d* provides:

Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.

In *Barsh v. Mullins*, 338 P.2d 845 (Okla. 1959) the court held that where a glass manufacturer accepted the benefit of an arrangement between one of its employees and a third party for the transportation of its wares in the course of his employment and in the performance of a duty that it had given him the authority to perform, the company was in no position to deny

knowledge of the arrangement. The court relied upon Section 282 of the *Restatement of Agency 2d*.

In *Reynolds v. Snow*, 197 NYS 2d 590 aff'd 168 NE 2d 882 (N.Y. App. Div. 1960) the court held that under the provisions of Section 282 of the *Restatement of Agency 2d* where a husband acquired stock in violation of a third party's rights in the name of his wife that the knowledge would be imputed to the wife and that the third party could recover.

In 3 Am. Jur. 2d *Agency*, Section 270, the general rule is acknowledged that a principal is liable for the contracts of his agent where the third person had no knowledge of the agent's dereliction. In the instant case, the action can be one in conversion or the violation of the contractual relationship (by conversion) between the plaintiff and defendant's agent.

In 3 Am. Jur. 2d, Section 261 *Agency*, it is recognized that a principal is liable for the acts of his agent within his scope of employment or apparent authority which the principal ratifies with knowledge of the facts surrounding the circumstances. In the instant case, the actions of England were for the direct benefit of the defendants' interests and in satisfaction of their accounts and the evidence presented to the court upon which the original judgment was based disclosed knowledge on the part of England and the defendants as to the impropriety of using the stock in question to satisfy England's accounts. Further, the defendants have retained the benefits of the conversion in effect ratifying

the acts of England's conversion. When a principal has knowledge of acts of his agent which were contrary to law, he has a duty to disaffirm those actions at the first reasonable moment. If there is any action on the part of the principal that indicates his intention to become a party to the transaction it constitutes ratification. *Moses v. Archie McFarland & Son*, 119 Utah 602 P.2d 531 (1951). The Utah court in *Thirteenth and Washington Street Corp. v. Nelsen*, 123 Utah 70, 254 P.2d 847 (1953) recognized that where a landlord authorizes the conduct of another which amounts to tortious conduct, he must bear the responsibility of the conduct.

In *Malia State Bank Commissioner v. Giles*, 100 Utah 562, 114 P.2d 208 (1941), the Utah court was concerned with a situation where the pledgee of stock received certificates belonging to the wife of a pledgor. The court held under the circumstances of that case that the pledgee was placed on notice as to the limitation of the apparent authority of the agent. The facts of that particular case allow a justifiable inference that in this case the defendants should have been on reasonable notice that the stock England converted and used for their benefit was not free from suspicion. In the instant case, the plaintiff acted in good faith and with innocence of fraudulent actions of England and the defendants retained the benefits of their agent's action. Under such circumstances, the acceptance of the benefit constituted a ratification and estops the defendants from disclaiming liability for conversion. *Latsis v. Nick Floor*, 99 Utah 214, 104 P.2d 619 (1940). In the last

cited case the court held that where benefits of illegal action of an agent are retained by the principal that they become liable to an innocent third party as if an agent had acted properly.

A case very similar in legal substance to that of the instant action is *Allred v. Hinckley*, 8 Utah 2d 73, 328 P.2d 726 (1958). In this action a seed grower was the plaintiff against a seed buyer and its agent. The seed buyer's agent falsely represented that the seed had been purchased from the growers and the agent's principal, the defendant, had converted such seed to its own use. The court held the defendants liable under a theory of conversion stating:

We consider the second question first: The Company is clearly liable for the full value of the seed which Malin sold to it without authority to do so from the grower. For by taking possession of such seed upon delivery from Malin who had no right to make such sale or delivery, the Company converted such seed to its own use. By such conversion the Company became liable to the grower for the full value of such seed less the amount which the grower received from it as advancement.

A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. The measure of damages of conversion is the full value of the property. It requires such a serious interference with the owner's right that the person interfering therewith may reasonably be required to buy the goods. Although conversion results only from

intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right. A purchaser of stolen goods or an auctioneer who sells them in good faith becomes a converter since his acts are an interference with the control of the property or in other words, a claiming of the ownership in such property and taking it out of the possession of someone else with intention of exercising dominion over it is a conversion. Thus a bona fide purchaser of goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods.

Under the theory of the above recited cases of the Utah Supreme Court, it is apparent that the defendants were liable for the conversion of plaintiff's stock, and that as a matter of law they have no defense based upon the position of their agent or the fact that his knowledge may have been adverse to the plaintiff since the acts were definitely beneficial to the defendants and the defendants retained the benefits of the conversion.

C. Assuming the knowledge of the defendant's agent will not be imputed to the defendant, plaintiff is still entitled to Summary Judgment as knowledge is not an essential element of a conversion action.

Even assuming the defendant and its agent were acting adversely so that the agent's knowledge of plaintiff's ownership could not be imputed to defendant, such knowledge is irrelevant. The law is clear that a conversion action will lie whether or not the defendant

knows that the property he converts belongs to plaintiff. 18 Am. Jur. 2nd Section 7 Conversion 162 states:

Generally, the motive the defendant acts with is immaterial in an action for conversion. Liability for a conversion is not necessarily precluded by the fact the defendant acts . . . sincerely, innocently . . . or in ignorance of the plaintiff's interest in the properties . . . An action for conversion does not rest on the knowledge or intent of the defendant.

The present case is controlled by the above-stated general rule which has been followed consistently by the Utah Supreme Court. In the case closely in point, *Allred v. Hinkley, supra*, Utah Supreme Court stated:

Although conversion results from intentional conduct it does not however require a conscious wrong doing but only an intent to exercise dominion or control over the goods inconsistent with the owners right.

In the present case, the defendant Prince-Covey & Co. exercised dominion and control over the plaintiff's securities and interfered with his right therein so that the defendant is liable regardless of whether or not it knew that the securities were owned by plaintiff.

D. Value is not an issue.

The general rule is that plaintiff, upon conversion of his securities, is entitled to the value thereof within a reasonable time after his notice of the conversion. The *Western Securities Company v. Silver King Consolidated Mining Company of Utah*, 57 Utah 88 192

Pac. 664, 672 (1920). The affidavit of Mack E. McBride which was not controverted by the defendant established a price within two weeks of plaintiff's knowledge of the conversion. The court was proper in holding that two weeks was a reasonable time.

The defendants attempt to argue that the Judgment should not have been granted or once granted should have been set aside because plaintiff was incorrect about the date of the conversion. However, the date of the conversion is immaterial. It is the date plaintiff receives notice of the conversion that is important. *Western Securities Co. v. Silver King Consolidated Mining Company of Utah, supra*. The uncontradicted evidence is that plaintiff learned of the conversion on September 13th, 14th, or 15th (see deposition page 18). The date of conversion whether in August or September is unimportant.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND FOR REHEARING

The defendants sought relief from the court's judgment heretofore entered by invoking the provision of Rule 60(b) of the Utah Rules of Civil Procedure. The motion to set aside the judgment and for rehearing does not specify what portion of Rule 60(b). Utah Rules of Civil Procedure, the defendants contend justifies the court in relieving the defendants from the

judgment currently against them. In their brief, defendants' specify Rule 60(b)(7). Rule 60(b) U.R.-C.P. provides:

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken . . .

Rule 60(b) of the Utah Rules of Civil Procedure is patterned after Rule 60(b) of the Federal Rules of Civil Procedure and therefore decisions of courts and

authorities treating the Federal rule are useful in determining whether defendants are entitled to any relief.

The motion of defendants supported by an affidavit from Almon Covey concerning Ted England's duties and responsibilities relates to the scope of his authority. As noted heretofore where an agent converts property of a third person and turns it over to his principal for their mutual benefit, the conversion is complete and if the fruits of the conversion are retained, there is no question as to scope of authority. Further, nothing is set out in the affidavit of Almon Covey which is either newly discovered or was not known at the time of the original action. Second, the contention that there is no proof of ownership is not supported by the record. Plaintiff testified in his deposition that he owned the stock (plaintiff's deposition pages 6, 9, and 10). That deposition was published at the hearing for Summary Judgment (R-22). The affidavit of Ted England, the person who converted the plaintiff's stock and who was defendant's agent, avers plaintiff's ownership. Further, the affidavit of Ted England asserts the belief that Almon Covey also knew of the fact that plaintiff owned the stock in question. Nothing is added in any of the affidavits of any of the parties that was not known or could not have been ascertained at the time of the original hearing. The affidavits would appear to raise ethereal contentions lacking any substance when analyzed against the issues raised in the complaint and the matters considered at the time the court granted Summary Judgment. Fur-

ther, the new contentions made with reference to the date of conversion were equally capable of discovery and subject to presentment to the court at the time of the motion for Summary Judgment.

In *Hartford Accident and Indemnity Co. v Shaw*, 273 F.2d 133 (8th Cir. 1959), the court denied relief under Rule 60(b) Federal Rules of Civil Procedure where there was a question of ownership of a chattel involved in the litigation. The court concluded that the evidence of ownership of the trailer could readily have been discovered before trial. To the extent that there is any substance to defendants' contentions with reference to the ownership of the stock, a position plaintiff contends is specious, the fact could have been determined within the time for presentation of the motion for Summary Judgment and therefore relief under Rule 60(b) is not available.

In *Flett v. W. A. Alexander and Co.*, 302 F.2d 321 (7th Cir. 1962) *cert. den.* 371 U.S. 841 (1962), the court denied relief under Rule 60(b) because there was no adequate showing that the newly discovered evidence could not have been discovered by the exercise of due diligence. *Moore, supra*. Para. 60.234 notes:

The evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding.

In *DiSilvestro v. U.S. Veterans Administration*, 9 FDR 435 (E.D.N.Y. 1949) the court denied relief under Rule 60(b)(2) where the evidence in question

was within the moving parties knowledge at the time of the original proceedings. In the instant case, it is apparent that the contentions which defendants advance in support of their motion for relief from judgment were well within their knowledge or ability to ascertain prior to the time this court originally rendered judgment.

The Tenth Circuit Court of Appeals in *Valmont Industries, Inc. v. Enresco, Inc.*, 446 F.2d 1193 (10th Cir. 1971) upheld a denial of relief on the grounds that a party did not use diligence when he failed to locate foreign patents before judgment. The patents were located in the patent office in two places and plaintiff did not search one place, did search the other place, but failed to find the subject matter. In *Caribou Four Corner's Inc. v. Truck Insurance Exchange*, 443 F.2d 796 (10th Cir. 1971), the court upheld the denial of relief from a judgment on the grounds of newly discovered evidence when the alleged mistake by the party was that he had given the wrong insurance policy to opposing counsel and to the court when he had the new policy in his files all the time. In *United States v. Aerodex, Inc.*, 327 F. Supp. 1027 (S.D. Fla. 1970), the court denied a motion for relief from judgment where the defendants knew of the testimony of witnesses who did not testify. The above federal cases clearly support the contention of plaintiff that defendants' motion should be denied.

A similar position was taken in *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953). In

that case, the Utah court noted with reference to the status of a person seeking relief from a default judgment: "however, the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." In *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731 (1909) the court refused to grant relief from a judgment under statutory provisions comparable to Rule 60(b) (Revised Statutes of Utah 1898 Sec. 3005). The court stated:

"... a party . . . must show that he has used due diligence to prepare and present his defense, and that he was either prevented from doing so because of some accident, misfortune, or circumstance over which he has no control; or that he has been misled or lulled into an action by some agreement or act of the opposite party or his counsel upon which he had a right to rely. This appellant has wholly failed to do (*Peterson v. Crosier*, 29 Utah 235, 81 Pac. 860)."

A similar position was reached by the Utah Supreme Court in *Chrysler v. Chrysler*, 5 Utah 2d 415, 303 P.2d 995 (1956). Although the Utah court has recognized that the trial court in making a determination to set aside a judgment has substantial discretion, *Cutler v. Haycock*, 32 Utah 354, 99 Pac. 897 (1907), relief is not automatic and must be based upon a justifiable basis under the rules. *Salt Lake Hardware Co. v. Neilson Land and Water Co.*, 43 Utah 406, 134 Pac. 911 (1913).

The case of *Kettner v. Snow*, 13 Utah 2d 382, 375 P.2d 28 (1962) appears to be applicable to the instant

motion of defendants. In that case, the Utah court held the trial court had abused its discretion in granting relief. The court observed:

We are in accord with the proposition urged by the defendant that the trial court has broad discretion in granting new trials; and in allowing relief under Rule 60(b). But its power is not without limitation and cannot be exercised capriciously or arbitrarily. It is elementary that under usual circumstances the regular rules of procedure are binding, and that a party who has allowed the time to move for a new trial to expire is thereafter precluded from doing so. This can be avoided only where it is made to appear that for one or more of the reasons specified in Rule 60(b) justice has been so thwarted that equity and good conscious demand that this extraordinary relief be granted. And the burden of showing facts to justify doing so is upon him who seeks such relief.

In order to warrant the granting of a new trial on the ground of belatedly discovered evidence, relied on by the plaintiffs, it would have to appear both that it 'by due diligence could not have been discovered in time to move for a new trial'; and that such evidence was of sufficient substance that there would be a reasonable likelihood of a different result. Otherwise, it is obvious that the ends of justice would not be served by ordering a new trial.

Sparing the detail of plaintiffs' affidavits, it is sufficient to say that any evidence referred to therein having any probative value on the disputed issues appears to be so meager that we cannot believe there is any likelihood that it

would produce a different result. But more significant, and of controlling importance, is the fact that no reason whatsoever is given to show why such evidence could not have been discovered in time to move for a new trial, nor in fact to have been presented on the original trial. Therefore, there existed no proper bases for granting relief under Rule 60(b).

No reason is given why the arguments now addressed to the court could not have been earlier presented. Under Rule 60(b) U.R.C.P., relief is not available from error resulting from mere carelessness. 7 *Moore's Federal Practice*, page 254. In *Kahle v. Amtorg Trading Corporation*, 13 FRD 170 (D.C.N.J. 1952), relief was sought from a Summary Judgment. The motion for the relief was predicted under Rule 60(b)(1) of the Federal Rules of Civil Procedure. The affidavit in support of relief from the judgment indicated that additional correspondence was available which at the time counsel thought was of no importance or relevance. There was no indication that the evidence was not available prior to Summary Judgment. The motion to set aside the judgment was denied. The court observed:

It seems obvious from the affidavit that the mistake, if any, was that of plaintiffs, who admittedly delivered only part of their file to the attorney who then represented them; the affiant admits that he withdrew from the file and delivered to the attorney only the documentary evidence which he 'believed to be pertinent to the claim.' The plaintiffs may not have been aware of the 'importance or relevance' of the documentary

evidence which they now offer, but this did not relieve them of the duty to make full disclosure to their attorney, who was competent to appraise the evidence. The course which they pursued was improvident but it was nevertheless intentional.

. . . It is our opinion that under the circumstances the plaintiffs may not be relieved of an adverse judgment on their representation that they are in possession of additional evidence which they thought 'was of no importance or relevance' when the motion was argued. If summary judgments are vacated on such tenuous grounds they will lack finality and the very purpose of Rule 56 . . . will be defeated. There will be no end to litigation.

The plaintiffs would not be entitled to prevail if the present motion were predicted on the grounds defined in subdivision (b) (2) of the Rule. (citing cases) The conditions prescribed by this subdivision are not present in the instant case. May the plaintiff's unable to meet the requirements of subdivision (b) (2), avoid them by an expedient resort to the grounds enumerated in subdivision (b) (1)? It is our opinion that the answer must be in the negative, especially where, as here, the mistake was a mistake of judgment ascribed solely to the plaintiffs . . .

This is not a case in which a litigant failed to defend because of 'mistake, inadvertence, surprise, or excusable neglect', the case in which subdivision (b) (1) is usually invoked . . . The plaintiffs were accorded a hearing on the motion and were afforded a full opportunity to present the evidence in their possession, including the evidence upon which the present motion rests.

Moore, supra, page 257 notes:

Parties desiring such relief must particularize, and do not acquit themselves of responsibility by showing merely that they placed the case in the hands of an attorney.

Where a party who makes an informed choice as to a particular course of action seeks relief, the mere fact that the choice was unfortunate is not a basis for relief from judgment. See *Samson v. Radio Corporation of America*, 434 F.2d 315 (2nd Cir 1970). The decisions from the Utah Supreme Court are of a similar nature. In *Masters v. LeSeuer*, 13 Utah 2d 293, 373 P.2d 573 (1962), then District Judge Ellett refused relief under Rule 60(b) from a judgment on the grounds of inadvertence and excusable neglect. The Supreme Court affirmed finding that where defendant had notice of the action and the intention of the opposing counsel to act in a particular fashion and failed to act to protect his client's interests that relief from a default judgment would not be granted. In *Ledwith v. Storkan*, 2 FRD 530 (1942), it was observed:

It is manifest that facts here do not involve either mistake or surprise. If relief may be granted at all it must rest either upon 'inadvertence' or 'excusable neglect.'

It may be added that while inadvertence and neglect are not precisely identical in their connotations they are often classified as synonymous . . . And finally, though in the rule, and in the statutes underlying it, the word 'excusable' does not precede the word inadvertence unless it is actually excusable.

Precisely what circumstances will avail to render the neglect of counsel excusable may not be adequately set down. But some measure of excusability may be gotten from decision where relief has been granted. They include (a) continuous preoccupation with the trial of a distracting first degree murder case, (b) reliance on assurance by the Court or a clerk thereof or opposing counsel as to the time of trial, (c) Failure to reach the place of trial in consequence of casualties in traffic (d) sudden illness of counsel, (e) unanticipated summons to the bedside of a dying relative, and other like incidents. In each instance there was inadvertence or neglect which intercepted the timely performance of a required act, but there was likewise some disturbing and distracting events which rendered the error excusable.

Inevitable, the argument of the defendant must proceed to the point where they assert, that having employed counsel for the protection of their interests, they did all that could be expected of them and are entitled to absolution from responsibility for their attorney's negligence. But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client.

A similar result was reached in *Peterson v. Crosier*, 29 Utah 235, 81 Pac. 860 (1905) and *Salt Lake Hardware Company v. Neilson Land and Water Co.*, *Supra*. See also *Restatement of Judgments*, Section 126(e) and (f) and Example 7 on page 617. In *Warren v. Dixon Ranch Co.*, *supra*, the Utah court cited Section 126 of the *Restatement of Judgment* with approval.

In *Board of Education v. Cox*, 14 Utah 2d 385, 384 P.2d 806 (1963), the Utah court refused to set aside a judgment under Rule 60(b) where the reason for the neglect was a complaint on the merits and where the defendants asserted the reason for failing to answer was that they thought the summons was invalid.

The motion and accompanying papers submitted by defendants does not justify relief under the broad provisions of 60(b)(7) of the Utah Rules of Civil Procedure. That provision is identical with 60(b)(6) of the Federal Rules of Civil Procedure. In commenting on its application in Summary Judgment situations, Professor Moore notes, 7 *Moore's Federal Practice*, page 362:

The principles governing judgments entered after a trial generally should govern summary judgments, as the latter are dispositions on the merits in which the attack is normally upon the substantive correctness of the decision. Judgments disposing of a case without consideration of the merits (default judgments, voluntary dismissals, and dismissals for failure to observe the Rules and others of the court) present somewhat different considerations, for they must be considered against a background of general preference for disposition of cases on their substantive merits.

In the instant case, the summary judgment process afforded the defendants every opportunity to present the merits of their case. They cannot now be heard to seek relief after the fact. Further, it is well settled that relief under a general clause of Rule 60(b) must

be on a basis other than would justify relief on any of the other specifically stated subsection. In 7 *Moore's Federal Practice*, page 343, it is observed:

It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon *some reason other than those stated in clauses (1)-(5)*; and second, the other reason urged for relief must be such as to *justify* relief.

See *Klapprott v. United States*, 335 U.S. 601 (1949). No articulation of any basis that would justify relief other than those set out in the particularized clauses is contained in defendants' motion. The clause is not a substitute for appeal, 7 *Moore, supra*, page 348, and courts require "exceptional and compelling circumstances" before a party will be granted relief from a judgment under the general clause. *Moore, supra*, page 348. It is submitted that in the absence of some more precise articulate reason to justify relief that the defendants have not stated any basis why a motion should be granted relieving them from the judgment heretofore entered.

As noted in other parts of this brief, there is no such thing as a general motion for reconsideration under Utah law. See also *Drury v. Lunleeford*, 8 Utah 2d 74, 515 P.2d 662 (1966). The defendants have filed their motion under Rule 60(b) of the Utah Rules of Civil Procedure. That rule provides only a very limited base for relief. It does not justify relief on a basis that could have been originally urged at the time of consideration of the matter which led to judg-

ment. Procedurally it is a narrow remedy. It is not a basis for re-argument of matters previously considered or for consideration of evidence that otherwise could have been presented. Considering the application of Rule 60(b) Utah Rules of Civil Procedure within the parameters of its limited application and the insipid basis urged by defendants for relief from the judgment, it is apparent that defendants have not made out a basis for relief under any of the subsection of Rule 60(b) of the Utah Rules of Civil Procedure. The motion of the defendants was properly denied.

POINT IV

THE UTAH SUPREME COURT SHOULD NOT ORDER A SET-OFF

For the first time in its brief on appeal the defendant urges that the Utah Supreme Court should order a set-off. The defendants did not allege a set-off in their answer; and as pointed out by the defendants, intervening liens may have attached to the judgment. These matters should be resolved in the lower courts in the proper manner and not decided on a basis of first impression on an incomplete record in the Utah Supreme Court.

CONCLUSION

There is no genuine issue of a material fact — all of the “unresolved questions of fact” that defendants attempt to raise are answered in that portion of the

record which contains plaintiff's deposition and which somehow was overlooked by the defendants.

As a matter of law the plaintiff is entitled to recovery for conversion as the defendant was not a purchaser of the stock however, assuming that it was, it could not be a bona fide purchaser as the knowledge of its agent concerning plaintiff's ownership would be imputed to the defendant and the defendant's retention of the proceeds of the conversion ratified the conversion of its agent; further, knowledge of plaintiff's ownership is unimportant in a conversion action.

The judgment should not have been set aside by the lower court as the defendants have raised nothing new that they could not have raised by exercising reasonable diligence and the grounds under which the defendants seek relief are not supported by Rule 60(b) of the Utah Rules of Civil Procedure.

The Utah Supreme Court should not order a set-off as the same was not pleaded by the defendants; the lower court has not had a chance to rule yet on the priorities of liens that may have attached to the judgment and there is no record upon which the Utah Supreme Court could base a decision.

Respectfully submitted,

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